



THE EMPLOYMENT RIGHTS ACT

JUNE 5, 2012

LLOYD ERSKINE SANDIFORD CENTRE

The Panel

- Dr. Hensley Sobers, HR & IR Consultant
- Mr. Ed Bushell, HR & IR Consultant
- Ms. Cicely Chase, Q.C, Attorney-at-Law



Context and Administrative Issues

Dr. Hensley Sobers

Issues Surrounding Employment Rights

Declarations of Employment Rights



The Constitution of Barbados Chapter 3

Protection of fundamental rights and freedoms from slavery and forced labour.

Issues Surrounding Employment Rights

Declarations of Employment Rights



Caricom's Declaration of Labour and Industrial Relations Principles Article 15

The Member States shall protect the right of everyone to work, to free choice of employment, to just and favourable conditions of works and to be gainfully employed.

Issues Surrounding Employment Rights

Declarations of Employment Rights



The International Labour Organisations's Fundamental Conventions:

- Freedom of association and recognition of the right to collective bargaining;
- Elimination of all forms of forced or compulsory labour;
- Effective abolition of child labour;
- Elimination of discrimination in respect of employment and occupation.

Issues Surrounding Employment Rights

Voluntarism vs. Legislation

- Role of the State – (abstentionist, conciliation);
- Attracting Foreign Investment – (clarity & predictability);
- Need for Regulated & Defined Methods for IR – (evolving litigious culture)
- Anticipated Growth of Entrepreneurship – (modern, global).

- The Employment Particulars
 - Statement of Changes
 - Right to Itemised Pay Statement
 - Standard Disciplinary Procedures
- (Progressive Discipline)

The Employment Particulars

Right to Statement of Particulars

- Name of Employee
- Name and Address of Employer
- Commencement Date of employment
- Period of Continuous Employment
- Title of the Job and Position Description
- Scale/Rate of Wages and Payment Intervals
- Working Hours (normal working hours)
- Period of Probation

The Employment Particulars



Right to Statement of Particulars

- Length of notice to be given and/or received in respect of termination of Contract of Employment
- The period for which temporary employment is expected to continue.
- The date fixed-term employment ends
- Place of work (transferability)

The Employment Particulars



Right to Statement of Particulars

- **Collective Agreements**
- General Terms and Conditions (sick leave, injury-on-duty, health & pension schemes)

The Employment Particulars **BARBADOS EMPLOYERS' CONFEDERATION**

Right to Statement of Changes

- Within 30 days after change of particulars a written statement containing particulars of the change.

The Employment Particulars

Right to Itemised Pay Statement

- Gross amount of wages
- Deductions and Purpose of Deductions
- Net Amount of Wages Payable
- Date of Payment and Dates of Pay Period

Standard Disciplinary Procedures

- Progressive Discipline;
- Gross Misconduct vs. Minor Misconduct;
- For Minor Misconduct – reasonable opportunity to make correction;
- Oral and/or Written warnings before stronger forms of disciplinary action;
- Expunction of written warnings from the records.

Standard Disciplinary Procedures

- Step 1: Statement of grounds for contemplated action and extension of invitation to meeting;
- Step 2: Meeting to take place where reasonably practicable within 7 working days of sending the Statement;
 - Employer to inform of right to representation and the basis for including in the statement the grounds of the intended action;
 - Employee to be given reasonable opportunity to consider response to allegations;
- The Employee must take all reasonable steps to attend the meeting.
- Decision of Employer to be in writing and advice of the right to appeal against the decision if not satisfied with it.

Standard Disciplinary Procedures



- Step 3: Employee has right to appeal and must follow the established procedures of workplace.
 - The matter may be referred to the Chief Labour Officer (CLO) for conciliation by the employee or his Trade Union.
 - The Employer may proceed with the disciplinary action before the meeting with the CLO takes place.
- NB – Where an employee is suspended with full pay pending an investigation, the Statement of Alleged Grounds for Discipline and the meeting do not apply until the employer contemplates taking disciplinary action against the employee.

The Importance of a 'Paper Trail'



Performance Appraisal

Performance Appraisal

Make sure performance appraisals give an accurate picture of the person's performance.



Written Records

Written Records

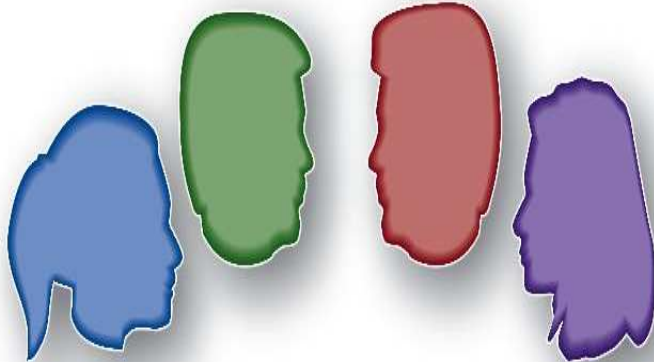
Maintain written records on behaviors leading to dismissal.



Written Warning

Written Warning

Warn employee in writing before dismissal.



Group Involvement

Involve more than one person in the termination decision.



Grounds for Dismissal

Grounds for Dismissal

Put grounds for dismissal in writing.

Employer Collectivism

Ownership by a group for the benefit of members of that group

- **BEC**
- **HRMAB**
- **BCCI**
- **BCSI**
- **SBA**
- **BMA**
- **BHTA**

Food for Thought

- **The Employment Relationship is one of the centrally important social and economic relationships affecting the ordering of our society.**



Dispute Settlement

Mr. Ed Bushell

PART II – ADMINISTRATION

FUNCTIONS OF THE CLO

5. (1) The Chief Labour Officer shall be responsible for the application, administration and enforcement of this act and for such other matters relating to employment rights as the Minister may direct.

- a) Receive and investigate all representations made to him concerning this act;
- b) Provide information and advice to employers and employees on the application of this act;
- c) Make periodic inspections of places of employment to ensure that there is full compliance with all laws relating to employment rights, conditions of employment and the protection of employees in their occupation and where necessary, provide information and advice as to the time frame for, compliance with such laws; and
- d) Prepare such reports on matters of employment rights as may be required under this act;

POWERS OF THE CLO

(3) The CLO shall have the power to

- a) Enter, examine or inspect at any reasonable time, whether by day or by night, with or without previous notice, any premises or place in which he has reasonable cause to believe that any person may be employed , or which he believes to be liable to inspection;
- b) Take another person with him (Police Officer
- c) Carry out any test or enquiry
- d) Require the employer to provide information
- e) Question the employer or employee on any matter pertaining to the application of this act
- f) Apply to any other person for information
- g) Require the production of any books, records etc required by any employment law
- h) Copy, remove, or make extracts from such books registers as he considers necessary

POWERS OF THE CLO

(3) The CLO shall have the power to

- a) Take or remove for the purpose of analysis, samples materials
- b) Direct the posting of notices etc.

(4) The chief Labour Officer should notify the employer of his presence unless he considers it to be prejudicial

(5) He may take material but he must give written notification of the article removed and he must provide safe custody.

OFFENCES

- a) Willfully obstructs, hinders or delays the CLO
- b) Without reasonable cause, fails to comply with any lawful instruction
- c) Fails to produce any book, register or documents
- d) Conceals an employee or prevents an employee who is required from appearing
- e) Refuses or neglects to supply within the specified time information required by the CLO
- f) Supplies false information; or,
- g) Refuses to answer any question put the CLO,

Is guilty of an offence and is liable on summary conviction to a fine of **\$20,000** or to **imprisonment** for six months or both

(7) Notwithstanding section (6) failure or refusing to answer any question which may incriminate you is not an offence under that sub- section

POWERS OF CLO

- (8) The CLO may institute proceedings in his own name against any person for any contravention of, or offence committed under this act, and may appear in and conduct any such proceedings
- (9) no prosecution for any offence under this act shall be instituted after the expiration of one year from the date of the commission of the offence

PART III - EMPLOYMENT RIGHTS TRIBUNAL



6. (1) Establishment of Employment Rights Tribunal

7. (1) The Function of the Tribunal is to enforce the rights conferred on persons by this Act

8.(1) Remedy for a person whose right has been infringed, is only by way of a complaint to the tribunal

9. (1) the tribunal may issue a summons

10. A person may be represented by

- a) Legal counsel
- b) A representative of a trade union or an employers association, or
- c) Any other person whom he desires to represent him

11. Except in cases of sexual Harassment

12. Members of the tribunal are ported against law suits

PART VIII - DISPUTES SETTLEMENT PROCEDURE

42 (1) Where an employee believes there is a dispute concerning an infringement of any right conferred on him by this act, he may present a complaint to the CLO

2) A complaint may be made by an employee, a trade union or another representative group on behalf of the employee

3) A group of employees

43. (1) deals with settlement of complaints by the CLO

PART IX - MISCELLANEOUS

- 44. 1) The CLO has 42 days to resolve a conflict. He must report to the tribunal if he fails to resolve the conflict
2) The tribunal proceed forthwith to consider the complaint
- 45. Deals with the action by the CLO if there is non-compliance
- 46. Tribunal's decision final on matters other than the law
- 47. How the Tribunals decision may be enforced

SCHEDULES



SECOND SCHEDULE – Constitution of the Tribunal, composition etc.

FOURTH SCHEDULE – Dismissal and Disciplinary procedures



LEGAL PERSPECTIVE


Cicely Chase, QC

Legal Perspective

Part V – Termination of Employment

Part VI – Unfair Dismissal

Part VII – Other Rights – Rights in
Relation to lay-off and short-
time.



Previously and up to the present time, the jurisdiction of Barbados has decided cases regarding termination of employment on the common law.




**Two (2) famous local cases
on the common
law are:**


**Juliette Taylor vs Barbados
Plastics [1981] 16 Barbados L.
R. 79**

and


**June Clarke v American Life
Insurance Company [2002]
(Civil Appeal 33 of 1998)**




The Court of Appeal agreed with Appellant Counsel's legal submissions that in the case of wrongful dismissal, where there is no express term for termination of the individual




Contract of employment by notice, the law will imply a term for termination by reasonable notice.




Further, legal propositions were advanced that an employee, dismissed in circumstances such as the Appellant, is entitled to both severance pay and damages for wrongful dismissal on the basis of the argument that where there is no term in the contract of employment providing for notice,




Then the law must imply a term of reasonable notice and to sever an employee without giving reasonable notice of severance entitles the employee to an award of damages commensurate with payment in lieu of notice.



Counsel for the Appellant also presented arguments on Sections 20 & 45 of the Severance Payments Act Cap 355A where Section 20 prescribes the statutory minimum periods of notice to be given to employees made redundant (*only for the purposes of the Severance Payments Act*). This section has not been replaced by the Employment Rights Act.




Section 45 of the Severance Payments Act Cap 355A speaks to the assessment of damages of the employee where there is a breach of contract of employment (*at an amount not less than such severance payment*). *Indeed damages at common law were calculated with reference to this formula.*



**At paragraph 29, of the
Judgment of Court of
Appeal, President,
Sir David Simmons,
Chief Justice stated**

“the cause of action for wrongful dismissal is on a different footing altogether from redundancy. There are conceptual differences.

Wrongful dismissal is a product of the common law. The wrongful termination of the individual contract of employment is a breach of that contract sounding on damages.”



Redundancy, on the other hand, is a creature of statute and termination of the contract law of employment by reason of redundancy entitles the employee to compensation calculated in accordance with a statutory formula. Such compensation is jurisprudentially and qualitatively different from damages.



A claim for damages for wrongful dismissal depends principally upon the terms of the individual contract of employment.

In the absence of an express term, the cause of action accrues where the employer dismisses the employee with no reasonable notice or without just cause.

UNFAIR DISMISSAL

The statutory right not to be unfairly dismissed was enacted in 1971 in England and according to the judgment of Sir David A. C. Simmons, Chief Justice of Barbados in the June Clarke case, when describing unfair dismissal stated that,

UNFAIR DISMISSAL

“it is, essentially an action which requires an examination of the substantive merits of the dismissal.”

UNFAIR DISMISSAL

The unfair dismissal legislation in England was a legislative response to the deficiencies of the common law as it then stood in 1971 and exposed by the judgment of Lord Reid in the case of Mallock v Aberdeen Corp [1971] 2 All E.R. 1278 @ 1282


UNFAIR DISMISSAL

“At common law, a master is not bound to hear his servant before he dismisses him. He can act unreasonably and capriciously if he chooses but the dismissal is valid.

The servant has no remedy unless the dismissal is in breach of the contract and then the servant’s only remedy is damages for breach of contract.”

UNFAIR DISMISSAL

“further, there is no discretion to re-engage or re-instate the employee at the common law action for wrongful dismissal but such matters are very much at the heart of the statutory action for unfair dismissal.”



Despite the enactment of Unfair Dismissal legislation in England, the common law action has still survived and it is possible that a dismissal could be both wrongful and unfair.

Quoting from the legal text of Deakin and Morris – Labour Law 3rd Ed [2001] at page 501,



It was stated there;

“where a dismissal is for redundancy, a statutory redundancy payment is available to employees who have met the qualifying conditions, and a claim for unfair dismissal is also possible normally where the selection process [for redundancy] is unfair in some way.”




**In England, redundancy is a
potentially fair reason for dismissal
[E R A Section 98 (1)]**




Part V

TERMINATION OF EMPLOYMENT

TERMINATION OF EMPLOYMENT



This is an extremely important section of the Employment Rights Act as it sets out the legal obligation of the employer to the employee regarding notice for termination.



Termination periods of notice are set out in Section 22 (1) of the ERA 2012 as follows:

NOTICE OF TERMINATION



Hourly, Daily, Weekly Paid Employees

(a) One (1) week's notice for a period of continuous employment of less than two (2) years;



Hourly, Daily, Weekly Paid Employees

(b) Two (2) weeks' notice for two (2) years or more continuous employment but less than five (5) years;

(c) Four (4) weeks' notice for five (5) years or more continuous employment but less than ten (10) years;

Hourly, Daily, Weekly Paid Employees

- (d) Six (6) weeks' notice for continuous employment for ten (10) years or more but less than fifteen (15) years;**
- (e) Ten (10) weeks' notice for continuous employment fifteen (15) years or more.**

Fortnightly employees:

- (a) Two (2) weeks' notice where there is continuous employment for less than five (5) years.**
- (b) Four (4) weeks' notice where there is continuous employment for five (5) years or more but less than ten (10) years.**

Fortnightly employees:

- (c) Six (6) weeks' notice where there is continuous employment of ten (10) years or more but less than fifteen (15) years.**
- (d) Ten (10) weeks' notice where there is continuous employment for fifteen (15) years or more.**




**Monthly employees employed
continuously for one (1) year or more.**

**(a) One (1) month's of notice for less
than ten (10) years.**




Monthly employees:

- (b) (1½) months' notice for continuous employment between ten (10) to fifteen (15) years,**
- (c) 2½ months' notice for continuous employment of fifteen (15) years or more.**



**These provisions are interesting.
Based on experience, the notice
stipulation represents a
significant departure from the
current industrial standard at
common law in Barbados**



**of three (3) months' for middle
management and upwards
unless express written
contractual terms and
conditions otherwise stipulate.**

Notice Under Contract of Employment




The notice required to be given by an employee continuously employed for one (1) year or more to terminate his contract of employment is not less than:

(emphasis mine).

Notice Under Contract of Employment

- a) One (1) week's notice for hourly, daily, weekly paid employees;**
- b) Two (2) weeks' notice for fortnightly paid employees;**
- c) One (1) month's for monthly paid employees.**

Where the contract of employment of an employee who has been continuously employed for one (1) year or more contains a shorter period of notice than that required by subsections (1) to (4) of Section 22, the provision is, from the commencement of this Act, invalid.




It would therefore be advisable where shorter notice periods have been agreed, for all employers and their respective Human Resources departments to review their contracts of employment and have them amended accordingly (subject to agreement of all parties in writing) so as to be in strict compliance with the ERA.



If such a review process is not undertaken, then the provisions of Employment Rights Act will be applicable in any event.

Section 22 (6) sets out that: -

An employer can give a longer period of notice where this is the practice, given the nature and functions of the work performed or any party can waive their right to notice on any occasion or from accepting a payment in lieu of notice.



Section 22 (7) sets out that a payment to an employee in lieu of notice does not satisfy

Section 22 (7)

above where the amount tendered by the employer is less than the sum net of any tax or other deductions lawfully made, that the employee would have been entitled to receive from the employer if he had worked throughout the period of notice instead of opting for a payment in lieu of notice.

Section 22 (8)


**Notice periods are mandatory
except for summary or
constructive dismissals.**

Section 23 (1)


Employers must produce a certificate of employment within fourteen (14) days of the date of termination of the employment.

Particulars of the Certificate of Employment are as follows:-


- (a) Name;**
- (b) Nature of employer's business;**
- (c) Period of continuous employment;**
- (d) Capacity in which employee was employed immediately before end.**



On an employee's request at Section 23 (2), the employer has to provide written particulars of the reasons for his dismissal where the employer gives the employee notice of termination of the contract and where the



employer gives no notice or where the employee is employed under a contract for a fixed term and the term of that contract expires without being renewed under the same contract.




If the minimum period of notice is not adhered to where the employer refuses to give notice or gives inadequate notice, the employee can make a complaint to the Employment Rights Tribunal established by Section 6 of the ERA.



The Employment Rights Tribunal's (ERT) powers are established under Section 24 (2) regarding notice.

The ERT can order outstanding notice to be paid to the employee by the employer or order the employer to pay the employee



a sum equal to two (2) weeks' wages, and a sum equal to four (4) weeks' wages for each month or part of a month during which the employer fails to comply;



Timelines for the Complaint to Employment Rights Tribunal are set out in [Section 24 \(3\)](#) of the ERA.

The complaint must be made before the end of six (6) months of the end of employment.

GROUNDS OF THE COMPLAINT

Section 25 sets out that:

A complaint is well founded if the employer refuses to provide the Certificate or according to Section 25 (1) (a) if the particulars surrounding termination are inadequate.



More ERT's Powers are set out in **Section 25 (2).**

It can order an employer statement to be provided.

Order employer to pay a sum equal to two (2) weeks' wages, or

More Tribunal Powers-Section 25 (2) (cont'd)

The Tribunal can:

Order an employer to pay four (4) weeks' wages to be paid for each month or part thereof in the event of the default in providing the certificate of employment.

Section 25(3) sets out:

The ERT can make a declaration as to what it finds to be the reasons for the dismissal.

Section 25 (4) sets out that complaints cannot be considered by the Tribunal before the end of three (3) months beginning with date the employment ended or it has the

Section 25(3)

power to extend the period where it was not reasonably practicable for the complaint to be made in three (3) months.



Part VI


UNFAIR DISMISSAL

UNFAIR DISMISSAL PROVISIONS UNDER THE ACT PART VI

Section 26 (1) outlines provisions for unfair dismissal.

- **Where a contract is terminated with or without notice.**
- **Where a fixed term contract expires without being renewed.**

UNFAIR DISMISSAL PROVISIONS UNDER THE ACT PART VI



Where an employee terminates with or without notice in circumstances where he is entitled to terminate due to his employer's conduct.

UNFAIR DISMISSAL PROVISIONS UNDER THE ACT PART VI


Section 26(2) sets out an instances where an employee shall be taken to have been dismissed where-

- the employer gives notice to the employee to terminate his contract of employment; and
- at a time within the


UNFAIR DISMISSAL PROVISIONS UNDER THE ACT PART VI

period of that notice, the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the notice of the employer is due to expire and the reason

UNFAIR DISMISSAL PROVISIONS UNDER THE ACT PART VI



for the dismissal is to be taken to be the reason for which the notice of the employer is given.




The right of the employee not to be unfairly dismissed is set out at **Section 27 (1) of the ERA.**

Regarding Section 27 (3), this subsection does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than one (1) year ending the effective date of termination.




Effective date of termination is defined at Section 28 of the Act as follows:

- If the contract is terminated by notice, the date on which the notice expires.**
- If the contract is terminated without notice, the date on which the termination takes effect.**



Regarding a contract for a fixed term which expires without being renewed, date on which the term expires.

In cases of Section 27 (3), amounts for less than one (1) year where the employer terminates or where a notice by employer, if given in material date, expires at a date later than effective date of termination, the later date is the effective date of termination.



Respective instances of later dates are set out in [Section 28 \(4\)](#) such as when the employee terminates and not the employer.

FAIRNESS

This is dealt with at [Section 29 \(1\)](#) of the Act where the reason or principal reason must be stated for the dismissal. There must be a reason falling under [Section 29 \(2\)](#) or some “other substantial reason” of a kind to justify dismissal.

RIGHT TO DISMISS



Section 29 (2)

Circumstances surrounding a right to dismiss by an employer are dealt with under this section.

This Section also relates to the capability of the employee to perform the work which he was employed to do.



Relevant particulars are:-

- An employee's conduct,
- Employee made redundant subject to **Section 31**.

RIGHT TO DISMISS

- **Employee could not continue to work without him or his employer contravening a duty or restriction imposed by law.**

“CAPABILITY” DEFINED



Section 29 (3) defines capability as follows:

Skill;

Aptitude;

Health;

Other physical or mental quality;

**The requirements of [Section 29 \(1\)](#)
whether decision to terminate was fair
or unfair, shall depend on:**

- (a) whether the employer acted
reasonably or unreasonably
in treating it as a sufficient
reason for dismissal.**

- **Employee complied with rules set out in Part A of Fourth Schedule of the Act.**

- **Section 29 (5) of the ERA** sets out that an employer cannot dismiss an employee for any reason relating to capability or conduct without informing the employee of an or any accusation made against him and giving him an opportunity to state his case (*audit alterem partem rule* – the right to be heard)

- **Section 29 (5) cont'd**

subject to the Standard Disciplinary Procedures and the Modified Disciplinary Procedures – Parts B and C of the Fourth Schedule.

CONTRAVENTION OF THE RIGHT NOT TO BE UNFAIRLY DISMISSED

**Section 30 (1) sets out these
circumstances of the right not to be
unfairly dismissed.**

CONTRAVENTION OF THE RIGHT NOT TO BE UNFAIRLY DISMISSED

If the employee is absent from work for a period of not more than one (1) year, although he was certified by a medical practitioner to be incapable of work due to occupational disease or work related accident.

CONTRAVENTION OF THE RIGHT NOT TO BE UNFAIRLY DISMISSED

Where an employee is absent from work for more than twelve (12) months consecutively or between twelve (12) to twenty-four (24) months in any one

CONTRAVENTION OF THE RIGHT NOT TO BE UNFAIRLY DISMISSED

period although certified by a medical practitioner to be incapable of work (not being occupational or work related accident).

CONTRAVENTION OF THE RIGHT NOT TO BE UNFAIRLY DISMISSED

or

- **that the employee was:**
- **a shop steward, health and safety representative or delegate of a trade union.**

CONTRAVENTION OF THE RIGHT NOT TO BE UNFAIRLY DISMISSED

- or an employee who participated in trade union activities outside or within working hours with consent of employer,
- an employee who is a workers' representative.

CONTRAVENTION OF THE RIGHT NOT TO BE UNFAIRLY DISMISSED

**an employee who made a complaint
regarding a violation of a law within
the employment.**

CONTRAVENTION OF THE RIGHT NOT TO BE UNFAIRLY DISMISSED

- **an employee who has HIV/AIDS.**
- **an employee who refuses to carry out tasks in circumstances set out in Section 104 Safety & Health at Work Act 2005.**

CONTRAVENTION OF THE RIGHT NOT TO BE UNFAIRLY DISMISSED

- **If employee disabled, whether or not occupational or work related or where employer could have reasonably been expected to offer alternative employment.**
- **Employee absent from work to attend to national duty.**

- **Refused to carry out an unlawful instruction of employer.**
- **Female employee terminated in contravention of her rights under the Employment of Women (Maternity Leave) Act.**



Any reason relating to:

- Race, colour, gender, age, marital status, religion, political opinion or affliction, national extraction, social origin, indigenous origin.

- Employee's responsibility for care of disabled family member or emergency in association therewith.

DEFINITION OF NATIONAL DUTY

Section 30 (2) provides the definition of national duty as follows:

- **Jury or civic duty imposed by law;**
- **Participation in a recognized organization;**

DEFINITION OF NATIONAL DUTY

- **A sporting event;**
- **Event for voluntary or non-profit organization such as Boys Scouts, Girl Guides, Cadet Corps, Red Cross, St. John's Ambulance Brigade at regional or international level,**

DEFINITION OF NATIONAL DUTY

- **Member of the Barbados Defense Force or Barbados Cadet Corps called out to service.**
- **Participation in emergency relief such as District Emergency Organizations.**

REDUNDANCY


Section 31 deals with Redundancy.

(1) A dismissal of an employee does not contravene the right conferred on him by Section 27:

REDUNDANCY

- where the reason of his dismissal is redundancy.
- Where requirements of subsections 4, 5, 6 of the same **Section 31** are complied with.

REDUNDANCY




Reasons for redundancy are set out in subsection 31 (2), where an employer ceases to carry on business or where requirements of the business have ceased.

In such cases, the employer still has to provide a written statement for reasons for dismissal.

REDUNDANCY

Section 31 (4) requires consultations and written statements. Section 31 (5) requires categories of affected workers and their numbers to be stated.



Subsection 31 (6) deals with consultations regarding affected workers and their stipulations and timelines for the consultations.

ENFORCEMENT AND REMEDIES IN RESPECT OF UNFAIR DISMISSAL



Section 32 gives the employee the right to make a complaint **Section 32 (1)**.

Time for considering the complaint is set out at **Section 32 (2)** (not before three (3) months after the date of termination).

ENFORCEMENT AND REMEDIES IN RESPECT OF UNFAIR DISMISSAL



Section 33 (1) (a), the ERT can explain to the employee the orders that it can make.

Section 33 (1) (b), the Tribunal can inquire whether the employee wishes to have the orders made.

ENFORCEMENT AND REMEDIES IN RESPECT OF UNFAIR DISMISSAL



Section 32 (2) where employee indicates his wishes to have an order made, subject to subsections 3, 4, 5.


ENFORCEMENT AND REMEDIES IN RESPECT OF UNFAIR DISMISSAL

The ERT may:-

make an order

- **for re-instatement (Section 34)**
- **re-engagement (Section 35)**

ENFORCEMENT AND REMEDIES IN RESPECT OF UNFAIR DISMISSAL




Section 32 (3) if using its discretion,
the ERT can decide whether to make an
order for
re-instatement or if not, appropriate
an order for
re-engagement.

FACTORS TO BE TAKEN INTO ACCOUNT FOR RE-INSTATEMENT OR RE-ENGAGEMENT

The Tribunal can make considerations

Section 33 (4) Whether employee wishes to be re-instated or in the case of re-engaged, any wish expressed by employee as to the nature of the order to be made.

FACTORS TO BE TAKEN INTO ACCOUNT FOR RE-INSTATEMENT OR RE-ENGAGEMENT



Whether it is practicable for the employer to comply with order for re-instatement or re-engagement.

FACTORS TO BE TAKEN INTO ACCOUNT FOR RE-INSTATEMENT OR RE-ENGAGEMENT

If employee caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement/re-engagement and if so, on what terms.

FACTORS TO BE TAKEN INTO ACCOUNT FOR RE-INSTATEMENT OR RE-ENGAGEMENT



Section 33 (5) if re-instatement or re-engagement is not possible in accordance with **Section 37**, the ERT can make an award for compensation.

EFFECT OF RE-INSTATEMENT

An order for re-instatement is an order that an employer treat an employee in all respects as if he had not been dismissed. [Section 34 \(1\)](#)

[Section 34 \(2\)](#) deals with payment of arrears wages etc. which the employee might reasonably be expected to have had but for the dismissal.



Through the ERT, reinstatement can provide:-

- **restoration of rights of security and pension rights**
- **a date for compliance with the order**

RE-ENGAGEMENT

Section 35 deals with the order for re-engagement on such terms as the Tribunal may determine, in employment comparable to that from which employee was dismissed or in other suitable employment.

RE-ENGAGEMENT

Section 35 (2) Terms of re-engagement

**-must be specified by order of the
Tribunal;**

and include:

- identity of employer;**
- nature of employment;**

RE-ENGAGEMENT

- remuneration for employment;**
- amount payable in respect of wages from date of termination to date of re-engagement.**

SECTION 36 REDUCTION OF THE EMPLOYER'S LIABILITY




The Tribunal shall take account of any sums paid to employee between termination and re-instatement by way of wages.

(i) in lieu of notice or ex gratia payment.

SECTION 36 REDUCTION OF THE EMPLOYER'S LIABILITY



- (ii) paid in respect of the employment of another employer.**
- (iii) other mitigating circumstances.**



Under **Section 37, the Tribunal shall award compensation to be paid by employer to employee if he is ordered to be re-instated or re-engaged and is not or the order is not fully complied with.**

The compensation must be calculated in accordance with the Fifth Schedule of the Act.

Part VII

OTHER RIGHTS

OTHER RIGHTS

Section 38

Employees have rights in relation to lay-off and short-time except where there is an agreement to the contrary.

“Lay-off” is defined by Section 38 (2) of the Act where the employee’s contract depends on work to be provided and none is provided.

OTHER RIGHTS


Section 38 (3) “Short-time” is defined by the Act where there is reason of a diminution in the work provided and where the remuneration is less than half of a week’s wages.

OTHER RIGHTS

Section 38 (4) explains the reasons where the employer temporarily ceases or intends temporarily to cease to carry on the business or where the requirements to carry on the business have ceased or will be ceased.


Section 38 (9) for the avoidance of doubt, nothing in this Section affects the operation of **Sections 6 and 7** of the **Severance Payments Act Cap 355A**.

Section 39 gives the employee the right to make a complaint to the Tribunal regarding short-time or lay-off.




And the Tribunal can make a declaration to that effect and order the employee to make a complaint that is fair and just in all of the circumstances.


Section 39 (3) relates to the time lines for making the complaint for short time or lay off – not before the end of a three (3) months period beginning with date of commencement of lay-off or short-time.



Section 40 provides for priority in recruitment of employees who were made redundant provided employees met performance standards where there is an increase in demand for goods and services.



Section 41 - An employee can make a complaint to the Tribunal that the employer contravened its duty at Section 40 and the Tribunal can make a declaration as to its effect and order employer to pay a sum to employee which is fair and just in all of the circumstances.



Section 41 (3) - Timelines for the consideration of the complaint are similar to those set out before (not before the end of 3 months beginning with a date on which a new employee commencing employment in employer's business or such other further period of time).

Section 41 (4) A new “employee” is one other than employee who is made redundant in the circumstances described at Section 40.

CONCLUSION

CONCLUSION

The new Employment Rights legislation will bring certainty and a standard to the period of notice for the termination of a contract of employment. The uncertainty of “reasonable” notice is a thing of the past.

CONCLUSION

Employees can take comfort in the notion that finally the law is on their side although there is no right to bring an action for unfair dismissal under one year.

CONCLUSION

Notice periods appear to be less attractive for employees under the legislation than what was determined as a period of reasonable notice under the common law and this is a plus for employers who would have to provide compensation for shorter periods of notice.

CONCLUSION


Employers will have greater responsibility under the Employment Rights Act with the introduction of the documents to complement the employment process from start to finish such as the Particulars of Employment pursuant to [Section 20](#),

CONCLUSION



the written statement consequent upon termination of employment setting out reasons for the dismissal and keeping employee records such as the Certificate of Employment and the itemized pay statement setting out particulars of income and deductions.

CONCLUSION



Non-compliance of the provisions of the Employment Rights Act will result in punitive monetary measures against the employers so they must be on their guard.

CONCLUSION

Unmistakably, the complaint of an employee to the Employment Rights Tribunal and the consideration of appropriate orders to be made may result in re-instatement or re-engagement save and except where the employee is summarily or

CONCLUSION

constructively dismissed or where such measures are deemed to be inappropriate for such re-instatement or re-engagement. Employers can take comfort in the knowledge that the award of compensation may still be an effective response to termination in certain circumstances.

CONCLUSION



The employer now has the right to a greater accountability to his employee, the tables have turned.

The legislation therefore begs the question, is this the dawning of a new ERA?



Thank You

Questions?